

Human Services Board, John Landerfelt, David Meezan, James May, and Donelle Staley

Daniel Jerman, Hearing Officer

April 19, 1996

Kathleen Badger, Fair Hearing No. 13,241

INTRODUCTION

The petitioner seeks attorneys fees from the Department of Social Welfare following a decision by the Board in this matter (entered January 23, 1996)⁽¹⁾ that the petitioner was eligible for ANFC while her eighteen-year-old son was a high school student because his failure to graduate high school before turning nineteen was due to a disability as defined by the federal Americans with Disabilities Act (ADA). The issue is whether, in light of that decision, the ADA entitles the petitioner to attorneys fees.
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PROPOSED FINDINGS OF FACT

The record in this matter reflects that the petitioner filed a request for fair hearing on November 21, 1994. At the time she was not represented by an attorney. In its decision terminating the petitioner's ANFC benefits, and in its Commissioner's Review Letter (dated December 19, 1994) the Department stated that its decision was based on the fact that the petitioner's son had turned eighteen and was not expected to graduate high school by age nineteen. This decision was consistent with federal and state eligibility criteria. See 42 U.S.C. § 606(1)(a) and Welfare Assistance Manual (W.A.M.) § 2303. A hearing in the matter was continued at the petitioner's request so that she could attempt to obtain legal representation.

On December 30, 1994, the Vermont Supreme Court issued its decision in the case of Howard v. Department of Social Welfare, 655 A2d 1102, in which it reinstated the decisions of the Human Services Board that had held that the federal ADA required the Department to continue ANFC benefits of families with children who were eighteen years old if the reason for those children not graduating high school before age nineteen was due to a disability.

On January 31, 1995, the petitioner notified the Board that she was being represented by the South Royalton Legal Clinic, and the case was again continued at the petitioner's request.

On March 20, 1995, this hearing officer participated in a telephone conference with the petitioner's and the Department's attorneys. At that time the Department informed the hearing officer and the petitioner that it conceded that based on the Howard decision if the petitioner could establish that her son's failure to graduate high school before turning age nineteen was due to a disability, the petitioner would be eligible for ANFC until his nineteenth birthday. The parties agreed that the petitioner would obtain medical evidence and educational records relevant to this issue and submit that information to the Department. The parties further agreed that a hearing would only be necessary in the matter if the Department deemed the evidence submitted by the petitioner to be insufficient to establish either that her son had a disability or, if he had one, that his failure to graduate high school by age nineteen was the result of that disability.

The hearing was again continued for several more months while the petitioner sought to obtain documentation regarding her son's disability and its impact on his progress in school. When that evidence was complete, the Department notified the petitioner and the hearing officer that it did not agree that the petitioner's son's failure to graduate before age nineteen was due to his disability. The matter was then set for hearing, which was held on November 13, 1995.

Following the hearing the hearing officer recommended that the Department's decision be reversed. The Department did not contest the hearing officer's Recommendation, and on January 23, 1996, the Board issued a decision that included the following:⁽³⁾

The Department does not dispute that if the petitioner's son's failure to graduate high school prior to his nineteenth birthday was due to a "disability", as defined by the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, or Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12132, the Vermont Supreme Court's decision in Howard et al v. Dept. of Social Welfare, Docket No. 93-342 (Dec. 30, 1994) (reinstating the Human Services Board decision in Fair Hearing Nos. 11,260 et al) requires that the petitioner remain eligible for ANFC as long as her son is eighteen years old and remains a full-time student. (Footnote omitted.)

A disability is defined under Section 504 and the ADA as "a physical or mental impairment that

substantially limits one or more of the major life activities," or "a record of such impairment". 28 C.F.R. § 35.104. The regulations expressly recognize specific learning disabilities and emotional problems as impairments and learning as a major life activity.

Based on the uncontroverted expert evidence noted above, it must be concluded that whether or not the petitioner's son was eligible for special education services, he had a disability under the ADA and Section 504 that was directly responsible for his failing several courses in his ninth, tenth, and eleventh grades of high school, which in turn was the sole reason he was unable to graduate high school before his nineteenth birthday.

Thus, it must be concluded that the factual burden of proof required of the petitioner under Howard et al, supra, is met, and the Department's decision in this matter is reversed. (Footnote omitted.)

The Secretary did not overrule the Board's Order (see 3 V.S.A. § 3091[h]), and it became the final decision of the Agency.

RECOMMENDATION

The petitioner's request for attorneys fees should be denied.

REASONS

The federal ADA at 42 U.S.C. § 12205 provides:⁽⁴⁾

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and cost. . . .

In Howard (*supra*), the Vermont Supreme Court held that the plaintiffs in that action were entitled to attorneys fees pursuant to the above statutes, and it remanded the matter to the Human Services Board to determine their amount. *Id.* at 1110. In Stevens v. Department of Social Welfare, 159 Vt. 408 (1992), the Court ruled that the Board has the authority to grant equitable relief under its statutory power to "provide appropriate relief" under 3 V.S.A. § 3091(d). Thus, it appears clear that the Board has the authority to consider the payment of attorneys fees by the Department to a petitioner who is successful in a claim brought pursuant to the federal ADA.

The problem for the petitioner in this case is that, unlike in Howard, it cannot be concluded that her fair hearing in this matter was "commenced pursuant" to the ADA. See 42 U.S.C. § 12205 (*supra*). As noted above, the Department, almost from the outset in this matter--at least from the time that the petitioner had retained the services of her attorneys--conceded (based on the Howard decision) that the petitioner was eligible for ANFC pursuant to the ADA as long as her son was a high school student and eighteen years of age if the petitioner could show that her son was disabled under the ADA and that his disability caused his inability to graduate high school before age nineteen.

The record in this matter is clear that after the ruling in Howard the Department promptly and unequivocally (although, apparently, not in writing) revised the basis of its decision. The issue, unlike in Howard, was not whether the ADA was applicable to the ANFC program. It was entirely one of fact,

and depended solely on an assessment of medical and other expert evidence regarding the petitioner's son's condition and school performance. The Department was not "discriminating" against the petitioner because of her son's handicap or refusing to provide her with a "reasonable accommodation" to that handicap. It was putting the petitioner to her proof to establish that her son had such a handicap, that it affected his graduation status, and that he was, therefore, eligible under the ADA for such an accommodation. This was a legitimate issue of fact, and did not implicate the petitioner's rights under the ADA.

Although the Board ruled in the petitioner's favor on those factual questions, on the basis of the record it cannot be concluded that the Department's position was arbitrary, unreasonable, or otherwise taken in bad faith.⁽⁵⁾ The issue in this case is similar to the many medicaid disability cases the Board considers--i.e., whether the petitioner is disabled. By the same legal basis that it certainly cannot be concluded that the Department is in violation of the ADA whenever it denies a medicaid application based on its assessment that the evidence does not establish disability, it cannot be concluded in this matter that at any time following the Supreme Court's decision in Howard the Department was denying the petitioner's rights under the ADA.

Inasmuch as it cannot be concluded that there is any statutory or equitable⁽⁶⁾ basis for the Board to award attorneys fees to the petitioner in this matter, the petitioner's request for such fees should be denied.

THIS MATTER WILL BE CONSIDERED BY THE BOARD AT A MEETING IN MONTPELIER ON WEDNESDAY, MAY 8, 1996. THE MEETING WILL BE HELD AT THE NATIONAL LIFE INSURANCE COMPANY - NORTH BUILDING (SEE ATTACHED MAP), IN THE TRANSPORTATION/MAINTENANCE CONFERENCE ROOM, 4TH FLOOR, AND WILL BEGIN AT 9:30 A.M., ALL VISITORS ARE REQUIRED TO SIGN IN AT THE FRONT DESK AS THEY COME INTO THE BUILDING. DIRECTIONS TO THE CONFERENCE ROOM WILL BE PROVIDED BY THE RECEPTIONIST AT THE FRONT DESK.

1. A copy of the Board's Order is attached to this Recommendation and is incorporated by reference herein.
2. Copies of memoranda submitted by the parties have been provided to members of the Board.
3. In that decision the Board also ruled that the hearing officer would consider the petitioner's request for attorneys fees in a separate Recommendation.
4. The Rehabilitation Act of 1973, the ADA's predecessor, provides at 29 U.S.C. § 794a(b):

In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

5. The hearing officer is aware of several other cases during this time with the identical issue that the Department settled based on its assessment that the evidence in those case was sufficient to support the factual basis of those petitioners' ADA status.

6. Even if it could be argued that the Board has a "general" statutory power to award attorneys fees or

similar compensation or reimbursement based on a specific ruling as to its "equity" (see e.g., In re: Peter Willey, 133 Vt. 593 [1975]), on the basis of the record in this case it cannot be concluded that such relief would be "appropriate" under 3 V.S.A. 3091(d).